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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-189

JUDY WARD SMITH ..... Petitioner

VS.

KENTUCKY STATE
BAR ASSOCIATION ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. The petitioner has contended that the holding of the Kentucky Court of Appeals to the effect that it can disbar an attorney by finding the attorney guilty of acts that were not included in the original charge and

as to which she had no notice that she would be charged, is clearly inconsistent with this Court's decision in *In re Ruffalo*, 490 U.S. 544 (1968). The Bar Association responds to this contention by claiming that the finding of the Court of Appeals that the petitioner was guilty of "multiple offenses" was "entirely consistent with and interwoven with the provisions of the charge with the exception of the finding that petitioner had given false testimony at the disciplinary trial hearing" (Brief in Opposition, p. 15), and distinguishes *Ruffalo* on the ground that in the case at bar no additional charges were leveled against the petitioner by the Bar Association. But it is precisely because the charges were not added by the Bar Association that the petitioner did not have even a belated chance to rebut them. The petitioner was charged by the Bar Association only with having engaged in unethical and unprofessional conduct by pleading guilty to the charge of an attempt to commit an offense, which the Bar Association describes as a "nondescriptive catch-all misdemeanor offense." (Brief in Opposition, p. 8). She was not charged with having obtained money under false pretenses or with forgery or with removal of court records, and she was not put on notice that if the Trial Committee or the Court of Appeals disbelieved her testimony she would be charged with perjury.

Before the Trial Committee the petitioner contended that she did not commit any offense, but pleaded guilty on the advice of counsel and on her own assessment of her chances of prevailing before the jury. The Trial Committee went behind the plea of guilty, as it had the power to do, "in order to determine just what offenses the [petition-

er] is or was guilty of," 492 S.W.2d at 882, but it limited its inquiry entirely to the question of whether the petitioner prepared and cashed Sally Fugate's check in the amount of $632.72. There was no consideration by the Trial Committee at all as to whether the petitioner was the person who forged the Circuit Judge's signature on the deed or who took the deed from the Clerk's office, and there was no evidence whatsoever, even in the transcript of the grand jury proceedings, that remotely connected the petitioner with either of these transactions. The Court of Appeals, however, found that the petitioner had committed "multiple offenses" and in addition had committed perjury, 492 S.W.2d at 882, thereby concluding that she was also guilty of forgery and removal of court records, the other offenses originally charged in the indictments. Not only was the petitioner in no way put on notice that she might be found guilty of these two offenses, not only did the Trial Committee not make any findings with respect to these offenses, but there is a total absence of evidence in the record that would support a finding of guilty as to these offenses, making such a finding a clear violation of due process of law. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 248 (1961); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

The Bar Association does not dispute the fact that at no time was the petitioner put on notice that she could be charged with perjury if the Trial Committee or the Court of Appeals disbelieved her version of the events. Interestingly enough, the Bar Association takes the position that perjury of which the petitioner was found guilty related

to her testimony as to what a handwriting expert, Maxwell Allen, told her lawyer. (Brief in Opposition, p. 5). She testified that she was told by her lawyer that Mr. Allen said he could not testify one way or the other as to whether the signature on the check was that of the petitioner. Mr. Allen's testimony before the Trial Committee was that "he would have to make some very damaging concessions" and that "the purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the checks." (App. p. 64a of Petition). In the view of the Bar Association this was the basis of the perjury charge.

The petitioner's assumption was that the purported perjury related to her entire defense — that she did not prepare and cash the check in question — rather than to the inconsistency between her version of what Mr. Allen had told her lawyer and his testimony before the Trial Committee. The petitioner's interpretation of the charge against her would appear to be borne out by the statements of the Court of Appeals to the effect that, "Her contentions are refuted by the sworn testimony of a large number of witnesses," 492 S.W.2d at 881, and "Therefore, in addition to the crimes already committed, an examination of this record shows conclusively that respondent [petitioner herein] has committed perjury in her attempt to extricate herself from these charges." 492 S.W.2d at 882. The evident confusion as to what was the basis of the charge of perjury demonstrates quite clearly why an attorney must have notice that such a charge will be leveled against her and must know the precise nature of the charge.

If the Bar Association's view as to what was the basis of the perjury charge is correct, the petitioner was specifically prejudiced by the failure to give notice in that she did not have the opportunity to show that she could have been mistaken about what Mr. Allen had said and did not deliberately testify falsely. Mr. Allen did not talk to the petitioner directly but to her attorneys, (App. p. 64a of Petition), and it is certainly possible that she either misunderstood their version of what Mr. Allen had said or that they relayed this information to her incorrectly. In order for the offense of perjury to be committed the testimony must be "absolute and false and made with wiltul intent." *Commonwealth* v. *Maynard*, 91 Ky. 131, 15 S.W. 52 (1891).[1] If the petitioner had been given notice that she would be charged with perjury in connection with this transaction, she could have shown the circumstances in which the information was relayed to her and could have demonstrated the absence of wilful intent.

On the other hand, if the basis of the perjury charge was the petitioner's testimony in support of her contention

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[1]In *Johnson* v. *Featherstone*, 141 Ky. 793, 133 S.W. 753, 754 (1911), the Court stated:

"The crime of perjury or false swearing involes a wilful, corrupt misstatement of a fact in that the witness wilfully testifies to a fact as true which he knows to be untrue.... In nearly every disputed case somebody is mistaken, misconceives, or misrecollects. Innocent mistakes in evidence are not criminal, and constitute neither perjury or false swearing. See also *Booth* v. *Commonwealth*, Ky., 419 S.W.2d 739 (1967).

that she did not execute and cash the check in question, the specific prejudice by the absence of notice of the charge may be even more significant. The petitioner was at no time put on notice that if she attempted to go behind the plea of guilty she could be "by her own testimony, irrevocably assuring her disbarment under charges not yet made." *In re Ruffalo, supra*, 390 U.S. at 551. The petitioner was representing herself and could not help but realize that her explanation of what had occurred would appear, to say the least, "unusual."[2] If she had known that she would face a charge of perjury and the penalty of disbarment if the Trial Committee disbelieved her testimony, she might well have chosen to "take her chances" with the plea on its face. How she would have proceeded if she had been specifically informed of what she was facing, "no one knows." *In re Ruffalo, supra*, 390 U.S. at 544.[3]

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[2]On the other hand, it may be queried, what motivation there would be for an attorney to jeopardize her career and risk possible imprisonment in order to obtain $632.72. The absence of such motivation would lend credence to the petitioner's version of the events, but this does not appear to have been considered by either the Trial Committee or the Court of Appeals.

[3]The Court of Appeals attempted to butress its conclusion that the petitioner had committed perjury by stating, "An examination of the writings by this court when compared with the known writing of respondent [petitioner herein] reveals without question that she prepared the documents. Therefore, in addition to the crimes already committed, an examination of this record shows conclusively that respondent [petitioner herein] has committed perjury in her attempt to extricate herself from these charges." 492 S.W.2d at 882. In the proceedings

(Continued on Page 7)

The petitioner was charged only with having pleaded guilty to an attempt to commit an offense, and the Trial Committee went behind her plea, as it had the power to do, solely for the purpose of determining whether she prepared and cashed a check of Sally Fugate in the amount of $632.72. She was not charged before the Trial Committee with having committed "multiple offenses," there was no issue in those proceedings with respect to her having forged the Circuit Judge's signature on a deed or having removed court records, and there is not a shred of evidence in the record, even in the transcript of the grand jury proceedings, that remotely connected the petitioner with those transactions. The Court of Appeals, however, found that she had committed "multiple offenses" and that she was also guilty of perjury.

In *In re Ruffalo, supra*, this Court stated: "The absence of fair notice as to the reach of the grievance pro-

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(Continued from Page 6)

before the Trial Committee the petitioner produced a check with the signature admittedly signed in her name by her late husband. It was her theory that her husband, who had on other occasions signed her name on checks, signed her name on the Sally Fugate check. The Court of Appeals did not compare her husband's signature of the petitioner's name with the signature on the Sally Fugate check, and if it had, it might have not been so positive that the signature on the Fugate check was actually that of the petitioner. If the petitioner had been specifically charged with perjury and given an opportunity to defend the charge, she doubtless would have insisted that this comparison be made, and if it had been the Court of Appeals might have found she was innocent of the false pretenses charge as well.

cedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 551-2. It is equally clear that the present petitioner did not have "fair notice as to the reach of the grievance procedure and the precise nature of the charges," and she too has been deprived of due process of law. The holding of the Court of Appeals of Kentucky to the contrary flies in the face of this Court's decision in *In re Ruffalo, supra*, clearly justifying the grant of certiorari by this Court.

2. The Bar Association does not dispute the petitioner's contention that the use of grand jury testimony to resolve a crucial issue of credibility against an attorney in bar disciplinary proceedings raises a substantial constitutional question. Nor does it deny that the use of such testimony in the case at bar was in flat violation of the Rules of the Court of Appeals of Kentucky applicable to bar disciplinary proceedings. Instead it argues that the petitioner "waived" her right to confrontation and cross-examination of the witnesses whose testimony appeared in the grand jury transcript and her right to insist on compliance with the Court rules by "voluntarily" introducing the transcript into evidence. Ignoring the fact that there was no discussion of "waiver" by the Court of Appeals in its opinion, the Bar Association assumes that the Court of Appeals found that a "waiver" had occurred and contends that whether federal constitutional rights can be waived is a matter of state law, so that a finding of waiver by the state court conclusively precludes review of the petitioner's constitutional contentions by this Court. This Court, of course, has held exactly to the contrary, *Henry v. Mississippi*, 379 U.S. 443 (1965), and even if the state

court had found that a "waiver" had occurred, this would not preclude consideration of the petitioner's constitutional contentions by this Court.

In any event, the contention that the petitioner could have "waived" her right to confrontation and cross-examination in the case at bar or her right to insist on compliance with the Court rules is clearly misplaced. The Bar Association states, "In the course of her defense, petitioner voluntarily and for her own benefit entered the grand jury testimony leading to her indictments into evidence." (Brief in Opposition, p. 4).[4] This is simply not what happened. The petitioner testified at length before the Trial Committee as to her view of what had occurred (Petition for Certiorari, pp. 6-7), and then candidly informed the Trial Committee that Mrs. Fugate had testified before the Grand

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[4]The Bar Association also notes that the petitioner relied on the grand jury testimony in her response to the rule to show cause issued by the Court of Appeals and says that, "The grand jury testimony included only testimony concerning each of the aforesaid three indictments." (Brief in Opposition, p. 4). In point of fact, there was no testimony in the transcript that remotely connected the petitioner with either forging the Circuit Judge's signature on the deed or with removing the deed from the Clerk's office. The testimony to which the petitioner referred in her response was related to her suggestion that her husband and Odessa Fugate Jones may have been acting together to injure both the petitioner and Sally Fugate, and consisted of the testimony of the Clerk to the effect that Mrs. Jones was the person who discovered the missing deed and that the Clerk did not recall the petitioner's being in the record room during the time when the deed was presumably taken. (App. p. 20 of Brief in Opposition).

Jury that the petitioner was the person who had prepared the check in question. Far from being for the petitioner's benefit, the testimony could serve only to implicate her, but she felt that she was required to call this to the attention of the Trial Committee.[5] The Committee made clear its desire to have the transcript introduced into evidence, and the petitioner agreed. But so far as she knew, it would only be introduced for the purpose of confirming that Sally Fugate had made such a statement before the grand jury. She had no reason to believe at this point in time that the Trial Committee was doubting her veracity, and she certainly had no way of knowing that the Trial Committee would consider the grand jury testimony as substantive evidence, in violation of the Court rules. Nor could she have known that the Court of Appeals, again in violation of its own rules, would treat the transcript

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[5]Mrs. Fugate did not testify before the grand jury that she had ever discussed this matter with the petitioner or demanded that the petitioner explain why the proceeds had not been turned over to Mrs. Jones. The failure of Mrs. Fugate even to contact the petitioner in regard to the transaction casts serious doubt on her statement that the petitioner was the person who had prepared the check. It is far more likely that the check was prepared by the petitioner's late husband, who represented to Mrs. Fugate that he was doing so on instructions from the petitioner, and that when Mrs. Fugate and her daughter were called before the grand jury, they were reluctant to disclose this fact, since the petitioner's husband was not an attorney. If the Trial Committee had called Sally Fugate as a witness, all of these questions could have been fully clarified. Instead it chose to rely on the grand jury transcript, in violation of the Court rules, to resolve this crucial question adversely to the petitioner.

as substantive evidence that refuted the petitioner's testimony before the Trial Committee and showed that she was guilty of perjury. The petitioner was entitled to assume that the grand jury transcript was being introduced only so that the Trial Committee could confirm that Sally Fugate had given testimony adverse to the petitioner before the grand jury. If the Trial Committee then doubted the veracity of the petitioner, it was incumbent on them to call Sally Fugate as a witness so that they could question her and so that the petitioner could confront and cross-examine her. In no sense could the petitioner be deemed to have "waived" her right of confrontation and cross-examination and her right to insist on compliance with the Court rules by introducing the transcript for this limited purpose. The contention that by turning over the grand jury transcript to the Trial Committee the petitioner "waived" her rights of cross-examination and confrontation and her right to insist on compliance with the Court rules is simply incredible.

A substantial question is presented in the case at bar as to whether in bar disciplinary proceedings grand jury testimony can be relied on to resolve a crucial issue of credibility against the attorney and to support a finding that the attorney was guilty of perjury. That issue cannot be avoided by claiming that, on the facts of this case, the petitioner somehow "waived" her

rights by introducing the transcript for a limited purpose at the Trial Committee's request.[6]

3. The receipt of the grand jury transcript as substantive evidence and its consideration by the Trial Committee, as well as by the Court of Appeals, was in flat violation of the Court rules applicable to bar disciplinary proceedings. Although the petitioner was not put on notice that the transcript would be considered as substantive evidence, it is true that she turned it over to the Trial Committee. This being so, a question is necessarily presented as to whether the due process requirement that bar authorities and the courts follow their own rules in bar disciplinary proceedings is somehow vitiated if the attorney does not expressly object when there is the possibility that a departure from the rules may occur. It is submitted that, as a minimum, there can be no "waiver" of the right to insist on compliance with the rules, unless the attorney is first specifically informed that a departure from the rules is contemplated and given an opportunity to object. She should not, as here, have to speculate that her act of turning over the grand jury transcript for a limited

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[6]The Trial Committee indicated its desire to see the transcript at the first hearing (two hearings were necessary because the reporter of the first hearing lost his stenographic notes) and asked the petitioner if she had a copy. She replied that she had a copy, but did not have it with her at that time. She brought a copy of the transcript with her at the second hearing and gave it to the Trial Committee. The Trial Committee, of course, could have obtained a copy independently, whether the petitioner objected or not.

purpose will be construed as constituting a "waiver" of her right to insist that it not be considered as substantive evidence against her. The petitioner would go further, however, and contend that the bar authorities should not be permitted to put an attorney in a position where she must choose between insisting on compliance with the rules (even if she had been made aware that a departure from the rules was contemplated) and incurring the displeasure of the agency that determines guilt and recommends punishment by her insistence. This Court should grant certiorari to determine whether in bar disciplinary proceedings the bar authorities and the courts must comply with their own rules or whether they can disregard these rules when they find it convenient to do so and then claim that the attorney has "waived" her rights by not objecting.[7]

4. Finally, the Bar Association attempts to completely confuse the issues presented in this case by arguing that, "Petitioner would have this court sit as a fact finder," and that [she urges] "that this Court review the evidence presented at the disciplinary trial hearing and decide whether or not from certain evidence the petitioner prepared and endorsed the check in question." (Brief in Opposition, p. 16). In no sense has the petitioner asked this Court to "sit as a fact

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[7]If the petitioner had attempted to introduce the grand jury testimony as substantive evidence in the hopes of strengthening her case, a different question would be presented, *i.e.*, can the bar authorities permit the attorney to "waive" a rule purportedly enacted for her protection.

finder." What she has contended in this respect is that her rights of confrontation and cross-examination and her right to insist on compliance with the Court rules were violated when the Trial Committee found that the petitioner prepared and endorsed the Sally Fugate check on the basis of testimony contained in a grand jury proceeding. Likewise, she is not asking this Court to review any factual findings relating to the forgery of the Circuit Judge's signature on a deed or to the removal of the deed from the Clerk's office, because no such findings were made by the Trial Committee, and there is no evidence in the record, even in the transcript of the grand jury proceedings, that remotely connected the petitioner with either of these events. Nor is she asking this Court to review the finding of the Court of Appeals that she was guilty of perjury. What she contends in this respect is that she was entitled to notice that such a charge was going to be made and to some opportunity to defend against it. The petitioner has alleged serious violations of her constitutional rights in the proceedings before the Trial Committee and the Court of Appeals, but by no stretch of the imagination has she asked this Court to "sit as a fact finder." By resorting to such an absurd argument in opposition to the Petition the Bar Association has tacitly conceded the constitutional questions raised by the petitioner. These questions are indeed substantial and are of fundamental importance to the legal profession and the public whom it serves. Certiorari should be granted by this Court to resolve them.

CONCLUSION

For the reasons stated herein, and for the reasons set forth in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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